

Patel (Migration) [2022] AATA 918 (21 April 2022)

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DECISION RECORD

DIVISION:	Migration & Refugee Division
APPLICANTS:	Mr Piyushkumar Narottambhai Patel Mrs Payal Piyushkumar Patel Master Vivan Patel Master Keyaan Patel
REPRESENTATIVE:	Ms Samantha Smith
CASE NUMBER:	2012418
HOME AFFAIRS REFERENCE(S):	BCC2019/927796
MEMBER:	Nicola Findson
DATE:	21 April 2022
PLACE OF DECISION:	Perth
DECISION:	The Tribunal remits the applications for Employer Nomination (Permanent) visas for reconsideration, with the direction that the first named applicant meets the following criteria for a Subclass 186 - Employer Nomination Scheme visa: • Public Interest Criterion 4020 for the purposes of cl.186.213 of Schedule 2 to the Regulations.

Statement made on 21 April 2022 at 8:39pm

CATCHWORDS

MIGRATION – Employer Nomination (Permanent) visa – Subclass 186 (Employer Nomination Scheme) – bogus document or false or misleading information given in visa application – previous employment and skills assessment – site visits showed other businesses operating at premises – leasing, subleasing and signage arrangements – comprehensive and verifiable documentary evidence and consistent and credible oral evidence supporting existence of company and applicant's employment – skills shortages – members of family unit – decision under review remitted

LEGISLATION

Migration Act 1958 (Cth), ss 5(1), 65

Migration Regulations 1994 (Cth), Schedule 2, cl 186.213, Schedule 4, criterion 4020(1), (5)

CASES

Arora v MIBP [2016] FCAFC 35

Batra v MIAC [2013] FCA 274

Trivedi v MIBP [2014] FCAFC 42

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

4. This is an application for review of a decision made by a delegate of the Minister for Home Affairs on 31 July 2020 to refuse to grant the applicants Employer Nomination (Permanent) visas under s 65 of the *Migration Act 1958* (Cth) (the Act).
5. The applicants applied for the visas on 16 January 2020. The delegate refused to grant the visas on the basis that the first named applicant (the applicant) did not satisfy the requirements of cl.186.213 of Schedule 2 to the Migration Regulations 1994 (the Regulations), because he found that the applicant did not meet Public Interest Criterion (PIC) 4020. The delegate found the applicant provided a bogus document or false or misleading information in a material particular, relevant to cl.186.213, and there were no relevant circumstances justifying the grant of the visas.
6. The first and second named applicants appeared before the Tribunal on 2 February 2022, to give evidence and present arguments.
7. The Tribunal exercised its discretion to hold the hearing by video. The hearing was held during the COVID-19 pandemic. The Tribunal determined it was reasonable to hold a hearing by video, having regard to the nature of this matter and the individual circumstances of the applicant. The Tribunal also had regard to the Tribunal's objective of providing a mechanism of review that is fair, just, economical and quick, and the further delay to the matter if the hearing was not to be conducted by video. The applicants did not raise any concerns in relation to holding a video hearing. The Tribunal is satisfied that the applicant was given a fair opportunity to give evidence and present arguments.
8. The applicants were represented in relation to the review, and their representative also attended the hearing.
9. For the following reasons, the Tribunal has concluded that the matter should be remitted for reconsideration.

CONSIDERATION OF CLAIMS AND EVIDENCE

10. The issue in this review is whether the visa applicant meets Public Interest Criterion 4020 (PIC 4020) as required by cl 186.213 for the grant of the visa. Broadly speaking, this requires that:
 - there is no evidence that the applicant has given, or caused to be given, to the Minister, an officer, the Tribunal, a relevant assessing authority, or Medical officer of the Commonwealth, a bogus document or information that is false or misleading in a material particular in relation to the application for the visa or a visa that the applicant held in the 12 months before the application was made: PIC 4020(1); and
 - the applicant and each member of the family unit has not been refused a visa because of a failure to satisfy PIC 4020(1) during the period starting 3 years before the application was made and ending when the visa is granted or refused, unless the applicant was under 18 at the time the application for the refused visa was made: PIC 4020(2) and (2AA); and
 - the applicant satisfies the Minister as to his or her identity: PIC 4020(2A); and

- neither the applicant nor any family unit member has been refused a visa because of a failure to satisfy PIC 4020(2A) during the period starting 10 years before the application was made and ending when the visa is granted or refused, unless the applicant was under 18 at the time the application for the refused visa was made: PIC 4020(2B) and (2BA).
11. The requirements in PIC 4020(1) and (2) can be waived if there are certain compelling or compassionate reasons justifying the granting of the visa: PIC 4020(4). However, this waiver does not apply to the identity requirements in PIC 4020(2A) and (2B). PIC 4020 is extracted in the attachment to this decision.

Has the applicant given, or caused to be given a bogus document, or information that is false or misleading in material particular?

12. The term 'information that is false or misleading in a material particular' is defined in PIC 4020(5) and the term 'bogus document' is defined in s 5(1) of the Act (see the attachment to this decision). In contrast to the definition of 'information that is false or misleading in a material particular' in PIC 4020(5), the reference in the definition of bogus document to a document that was obtained because of a 'false or misleading' statement has no requirement that it be relevant to a criterion for the grant of the visa: *Arora v MIBP* [2016] FCAFC 35; *Batra v MIAC* [2013] FCA 274.
13. The requirement in PIC 4020(1) not to provide a bogus document, or false or misleading information, applies whether or not the Minister became aware of the bogus document or information that is false or misleading in a material particular because of information given by the applicant: PIC 4020(3). It also applies whether or not the document or information was provided by the applicant knowingly or unwittingly.
14. While PIC 4020 refers to information that is false, in the sense of purposely untrue, it is not necessary for the Minister (or the Tribunal on review) to conclude that the applicant was aware the information was purposely untrue in order for PIC 4020 to be engaged. However, an element of fraud or deception by some person is necessary to attract the operation of the provision: *Trivedi v MIBP* [2014] FCAFC 42.
15. The applicant is a 34-year-old citizen of India. He made the current application for a Subclass 186 visa on the basis of being nominated by his sponsor to work in the position of Motor Mechanic (General) (ANZSCO 321211).
16. The delegate's decision record, provided to the Tribunal for the purpose of the review, sets out that on 8 April 2017, the applicant applied for, and was subsequently granted, a Subclass 457 visa. In that visa application, the applicant provided a skills assessment issued by VETASSESS on 27 October 2016, wherein in support of his skills assessment application to VETASSESS, the applicant provided evidence of employment with Zoom Mechanics Pty Ltd from 2012 to 2016. The decision also records that in his Subclass 186 visa application, the applicant stated that he had worked for Zoom Mechanics Pty Ltd, from 2012 to 2016. However, on the basis of information before the Department - including findings made by Departmental officers after site visits to the nominated premises of 80 Camp Road, Broadmeadows, Victoria, in March and October 2013; a statement from a representative of 'United Motor Works' which indicates that that business had subleased and traded at the premises of Zoom Mechanics Pty Ltd between February 2013 and November 2015, as well as a statement from a representative of 'Auto-Glass Centre of Melbourne' which sets out it commenced trading at the site from June 2016; and information from the owner of the property who indicated that the property was being leased to ZPN Group – the delegate was of the view that the applicant had not worked for Zoom Mechanics Pty Ltd during the entire period of claimed employment, at least between February 2013 and November 2015 when

United Motor Works was operating on the leased property and between June 2016 and October 2016 when Auto Glass Centre of Melbourne was operating on the leased premises. In addition, the delegate was also of the view that the VETASSESS skills assessment is a bogus document because it was obtained as a result of a false statement of employment with Zoom Mechanics Pty Ltd.

17. On 25 June 2020, the delegate invited the applicant to comment on evidence he had supplied to the Department suggesting that he had provided, or caused to be provided, a bogus document or false or misleading information. The applicant responded to the Department, and provided, among other things, photographs; payroll documents (including payslips, evidence of superannuation payments, Notices of Tax Assessments for the years ended 30 June 2013, 2014 and 2015; bank statements for the period 2013 to 2016 showing wage deposits; and a Statutory Declaration from his employer. Notwithstanding the additional information provided by the applicant, the delegate ultimately concluded that he did not satisfy PIC 4020 for the purposes of cl.186.213. Also, the delegate was not satisfied that there were grounds to justify the waiver of PIC 4020 and the granting of the visas.
18. Prior to the hearing, on 19 January 2022, the Tribunal received a comprehensive written submission from the applicant's representative, which sets out the background to this matter and responds to the various allegations made against Zoom Mechanics Pty Ltd. The submission sets out that the skills assessment issued by VETASSESS was not obtained because of a false or misleading statement and that the applicant did work for Zoom Mechanics Pty Ltd as claimed. A significant number of documents in support of the applicant's claims were also provided to the Tribunal, including ASIC and ABN records relating to Zoom Mechanics Pty Ltd, Contract(s) of Employment between Zoom Mechanics Pty Ltd and the applicant, PAYG Payment Summaries, Australian Taxation Office records in relation to the applicant, statement of contributions paid by Zoom Mechanics Pty Ltd to the applicant's superannuation fund, letters of support, and photographs.
19. The material before the Tribunal indicates that ZPN Group Pty Ltd (of whom Mr Japanjot Singh Ganda is the sole Director and shareholder) signed a lease agreement in respect of 1/80 Camp Road, Broadmeadows, with George's Jet Gas (Aus) Pty Ltd (the landlord) on 3 October 2011, with an initial term of five years. The submission explains that during the period of the applicant's employment with Zoom Mechanics Pty Ltd, only ABN's and business names associated with Mr Ganda were registered to this Broadmeadows address (including Zoom Mechanics Pty Ltd). In July 2016, ZPN Group Pty Ltd exercised its option for a further term of five years to be granted under the lease commencing on 1 October 2016.
20. The submission explains that in 2014, following two site visits, the Department first made the allegation that Zoom Mechanics Pty Ltd did not exist. It is submitted that the Department made this allegation despite having found the proprietor (Mr Ganda) and three employees tied to Zoom businesses at the premises during their site inspections. It is submitted that the Department came to the view that other businesses were operating out of the premises and, therefore, Zoom Mechanics Pty Ltd could not have been. The submission explains that when these allegations were first made, the Department took action to cancel Zoom Mechanics Pty Ltd's approval as a standard business sponsor as well as the visas of its sponsored employees. Zoom Mechanics Pty Ltd sought review of the Department's decision, and on 10 July 2015, the Tribunal (differently constituted) set aside the decision of the Department and substituted a decision that Zoom Mechanics Pty Ltd be barred from sponsoring for a specified period. Relevantly, in its decision the Tribunal accepted that there were no subleases operating out of the nominated premises. It is submitted that the catalyst for the Department's allegation came during the March 2013 visit, from Mr Suliman, at the time a friend of Mr Ganda, who sold cars from the lot and occasionally helped out Mr Ganda's employees in the mechanics workshop. The submission clarifies that

Mr Suliman has never held a lease at 1/80 Camp Road, Broadmeadows, or had any legal right to any part of the premises. In addition, he provided a statutory declaration in support of Zoom Mechanics Pty Ltd's review application, to the effect that the Broadmeadows premises had never been sublet.

21. It is submitted that in 2017 the Department received statutory declarations which formed part of the basis for the PIC 4020 findings against the applicant. It is submitted that the essence of these declarations was that Mr Ganda had sublet the business during the relevant period. It is submitted that one of the declarations received by the Department was made by Mr Suliman, in direct contradiction to his earlier statutory declaration. It is submitted, and the documents before the Tribunal support, that at around the time ZPN Group Pty Ltd exercised its option for a further term to be granted under the lease, sub-lease agreements to Mr Steven O'Shana and Mr Rocco Cuzzilla were offered, to take effect from November 2016. However, ultimately these subleases were unable to proceed. It is also submitted that at around the time the statements were made, the property owner, George's Jet Gas (Aus) Pty Ltd, wished to sell the property and the Real Estate Agent had a buyer motivated to pay above the purchase price for vacant possession. Given Mr Ganda, through his company, ZPN Group Pty Ltd, had a long term lease and did not wish to vacate, it is submitted these statutory declarations were produced in an attempt to force him out of the premises.
22. It is submitted that only signage related to Mr Ganda's businesses was ever erected during the relevant period. The submission explains that while the claim that the name 'United Motor Works' was registered to another ABN at the time of the Department's site visit is correct, that business had its business address listed in Reservoir until 2017. The submission goes on to explain that the United Motor Works sign was erected by Mr Ganda during the period when he was using the name unofficially, while also operating the United Service Station (to which it was attached). The submission explains that Mr Ganda had no knowledge of the business name being registered to anyone else at that time and that he, in fact, made application to register the business name in 2014.
23. The Tribunal observes that the Departmental file does not contain any of the information relied upon by the delegate in making his findings against the applicant. The applicant's representative, however, provided documents, including Departmental site visit reports, correspondence between the Department and the owner of 1/80 Camp Road, Broadmeadows, and statutory declarations of the purported lessees of the nominated address.
24. The submission indicates that notwithstanding the existence of these statements (noted to be given by third parties with potential ulterior motives to discredit Mr Ganda) there is significant evidence to support the existence and operation of Zoom Mechanics Pty Ltd, including: ASIC and ABN records; Australian Taxation Office records; and advertising (a Facebook page, a website (now inactive) and listed for business on dlook.com.au, whereis.com, yellowpages.com.au and whitepages.com.au).
25. The submission outlines that the applicant commenced working as a mechanic for Zoom Mechanics Pty Ltd in December 2012, and remained in the role until 23 October 2016. In support of this claim, a number of documents accompanied the submission, including:
 - A letter of support from the applicant's accountant confirming the applicant's full-time employment as a mechanic with Zoom Mechanics Pty Ltd between 2012 and 2016;
 - Letter dated 3 July 2021 from Mr Ganda, Director of Zoom Mechanics Pty Ltd, confirming (among other things) the applicant's employment as a full-time mechanic with the business between December 2012 and October 2016, and background to the operation of the business;

- Contract of Employment between Zoom Mechanics Pty Ltd and the applicant signed 26 November 2012;
 - Updated Contract of Employment between Zoom Mechanics Pty Ltd and the applicant signed 21 September 2015;
 - Bank statements of the applicant showing wage deposits made by Zoom Mechanics Pty Ltd;
 - Notices of Assessment for the years ended 30 June 2013 to 2016;
 - Australian Taxation Office statements in relation to the applicant for the 2012-13, 2013-14, 2015-16, 2016-17 financial years, which state (among other things) that the applicant was employed by Zoom Mechanics Pty Ltd as a Motor Mechanic;
 - Photographs of the applicant at his workplace;
 - Applicant's login details for GeoOP (a job management app) added by Mr Ganda from Zoom Mechanics Pty Ltd;
 - Contact Essential Super - Statement of Superannuation contributions made by Zoom Mechanics Pty Ltd for the applicant for the period January 2014 to October 2016;
 - A letter of reference dated 27 September 2015 on the letterhead of Zoom Mechanics Pty Ltd, confirming the applicant's service as a mechanic with the business since 24 December 2012, as well as his duties and responsibilities in the position.
26. It is submitted that the verification referred to in the delegate's decision is the same verification currently (and to date unsuccessfully) being used to refuse or cancel all permanent visas relating to former staff of Zoom Mechanics Pty Ltd.
27. It is submitted that the applicants have been blameless in the events involving Mr Ganda and Zoom Mechanics Pty Ltd. It is submitted that the applicant has been an upstanding member of the community for over 13 years; he has built up a skill in a trade which is in demand; and he executes his work to an extremely high standard. It is submitted that the second named applicant works in the childcare sector – an essential service, as disruptions to everyday life during the COVID pandemic continue to be experienced. It is submitted that with border closures and the loss of work visa holders, gaps in the labour market are ever growing and Australian businesses need help to retain all the skilled workers they can. It is submitted that Australia's interests are not served by sending away able-bodied, skilled persons working in areas of skill shortage at this time.
28. At the hearing, the applicant told the Tribunal that he came to in Australia in 2008 as the holder of a student visa, and subsequently attained Certificates III and IV as well as a Diploma in Automotive Mechanical Technology. He confirmed that he was successful in gaining a role with Zoom Mechanics Pty Ltd in December 2012, and that he worked as a mechanic on a full-time basis for this business from that time until October 2016. The applicant described to the Tribunal the nature of his employment with Zoom Mechanics Pty Ltd and the work he carried out, both onsite and offsite, on a day-to-day basis. The applicant also described, in detail, the structure of the business.
29. The applicant indicated to the Tribunal that he was not aware of his employer's lease situation, nor was it his business to be aware of it. He said that as far as he was concerned, he was turning up for work and being paid during the relevant period.
30. The Tribunal asked the applicant for his evidence relevant to the waiver provisions. The applicant expressed his upset to the Tribunal at the impact of the delegate's decision on him and his family. He told the Tribunal that having to deal with this matter, in which he feels he is being punished for no reason, has been very difficult. He confirmed to the Tribunal that both he and his wife are hard working and well regarded employees, working in areas in which there is currently a shortage of skilled workers.

31. In an oral submission made to the Tribunal during the hearing, the applicant's representative stressed that the documents relied on by the applicant to support his claimed employment with Zoom Mechanics Pty Ltd are from credible sources. It was submitted that there has been no bogus document or false or misleading information provided by the applicant to the Department (or to VETASSESS) at any time. Zoom Mechanics Pty Ltd did exist; the applicant worked there; and his work was as a motor mechanic.
32. On the basis of the material provided for the visa application, the Tribunal finds the applicant has stated that he was a Motor Mechanic for Zoom Mechanics Pty Ltd from December 2012 to October 2016. The Applicant gained a positive skills assessment from VETASSESS, relying on his work experience with Zoom Mechanics Pty Ltd from 2012 to 2016.
33. The issue of whether the applicant meets the requirements of PIC 4020 has arisen because the delegate concluded, on the basis of Departmental verification, that the applicant had not worked for Zoom Mechanics Pty during the entire period of his claimed employment, and that his skills assessment was a bogus document because it was obtained as a result of a false statement of employment with Zoom Mechanics Pty Ltd.
34. There is a considerable amount of consistent and credible evidence before the Tribunal that contradicts the findings made by Departmental officers and the information outlined by the delegate in his decision record, in particular the oral evidence obtained from the applicant as well as other documentation, such as employment and taxation records of the applicant, and supporting statements. The Tribunal also acknowledges the submissions and supporting material provided by the applicants' representative, which provides context to issues concerning Mr Ganda and his business, Zoom Mechanics Pty Ltd, as well the consequent implications for the applicant. In all the circumstances, the Tribunal is persuaded by this material and affords it weight.
35. On the basis of the evidence before it, the Tribunal has formed the view that there is extensive independent and verifiable evidence relating to the applicant's employment with Zoom Mechanics Pty Ltd between December 2012 to October 2016 that the Tribunal considers probative and persuasive. The applicant gave detailed and convincing evidence about his employment with Zoom Mechanics Pty Ltd, the work he undertook on a day-to-day basis and his responsibilities. Having regard to the totality of the presented evidence, the Tribunal is satisfied that the material the applicant has provided – in particular, payroll records (including payslips and PAYG Payment Summaries), Australian Taxation Office records, and Superannuation Statements - genuinely and accurately reflect his employment with Zoom Mechanics Pty Ltd. There are no falsehoods in those documents. The Tribunal accepts the applicant was employed as a Motor Mechanic at Zoom Mechanics Pty Ltd on a full-time basis and performed the duties for the period as claimed.
36. There is no evidence to suggest the applicant's VETASSESS skills assessment is bogus. As far as the Tribunal is aware, there is no evidence that the assessment was obtained because of a false or misleading statement. The Tribunal does not consider the document to be a bogus document as it does not fall within the definition of a 'bogus document' in s.5.
37. The Tribunal does not consider that there is evidence that the applicant has given, or caused to be given, to the Minister, an officer, the Tribunal, a relevant assessing authority or a Medical Officer of the Commonwealth, a 'bogus document' as defined in s.5.(1) or information that was false or misleading in a material particular as defined in PIC 4020(5), in relation to the visa application or a visa held in the 12 months before the visa application was made.
38. Therefore, the applicant meets PIC 4020(1).

Has a visa previously been refused on the basis of a failure to satisfy PIC 4020(1)?

39. PIC 4020(2) requires the Tribunal to be satisfied that the applicant and each member of the family unit have not been refused a visa because of a failure to satisfy PIC 4020(1) in the period commencing 3 years before the application was made and ending when the visa is granted or refused. This requirement does not apply to a person who was under 18 at the time the application for the refused visa was made: PIC 4020(2AA).
40. There is no evidence before the Tribunal to suggest that the applicant and/or each member of the family unit has been refused a visa because of a failure to satisfy PIC 4020(1) in the period commencing 3 years before the application was made and ending when the visa is granted or refused.
41. Therefore, PIC 4020(2) is met.

Has the applicant satisfied the identity requirements?

42. PIC 4020(2A) requires an applicant satisfy the Tribunal as to his or her identity. The applicant's identity documents have been provided with the application. No issue with his identity has been raised by the delegate. The Tribunal is satisfied that the applicant meets cl.4020(2A).

Has a visa previously been refused on the basis of a failure to satisfy PIC 4020(2A)?

43. PIC 4020(2B) requires that neither the applicant nor any family unit member have been refused a visa because of a failure to satisfy the identity requirements in PIC 4020(2A) during the period starting 10 years before the application was made and ending when the visa is granted or refused. This requirement does not apply to a person who was under 18 at the time the application for the refused visa was made: PIC 4020(2BA).
44. There is no evidence that the applicant or any member of his family unit has been refused a visa because of failure to satisfy the identity requirement.
45. Therefore PIC 4020(2B) is met.

46. Conclusion

47. On the basis of the above, the applicant does satisfy PIC 4020 for the purposes of cl.186.213.

DECISION

48. The Tribunal remits the applications for Employer Nomination (Permanent) visas for reconsideration, with the direction that the first named applicant meets the following criteria for a Subclass 186 - Employer Nomination Scheme visa:
 - Public Interest Criterion 4020 for the purposes of cl.186.213 of Schedule 2 to the Regulations

Nicola Findson
Member

ATTACHMENT

Migration Regulations 1994

Schedule 4

- 4020 (1) There is no evidence before the Minister that the applicant has given, or caused to be given, to the Minister, an officer, the Tribunal during the review of a Part 5 reviewable decision, a relevant assessing authority or a Medical Officer of the Commonwealth, a bogus document or information that is false or misleading in a material particular in relation to:
- (a) the application for the visa; or
 - (b) a visa that the applicant held in the period of 12 months before the application was made.
- (2) The Minister is satisfied that during the period:
- (a) starting 3 years before the application was made; and
 - (b) ending when the Minister makes a decision to grant or refuse to grant the visa;
- the applicant and each member of the family unit of the applicant has not been refused a visa because of a failure to satisfy the criteria in subclause (1).
- (2AA) However, subclause (2) does not apply to the applicant if, at the time the application for the refused visa was made, the applicant was under 18.
- (2A) The applicant satisfies the Minister as to the applicant's identity.
- (2B) The Minister is satisfied that during the period:
- (a) starting 10 years before the application was made; and
 - (b) ending when the Minister makes a decision to grant or refuse to grant the visa;
- neither the applicant, nor any member of the family unit of the applicant, has been refused a visa because of a failure to satisfy the criteria in subclause (2A).
- (2BA) However, subclause (2B) does not apply to the applicant if, at the time the application for the refused visa was made, the applicant was under 18.
- (3) To avoid doubt, subclauses (1) and (2) apply whether or not the Minister became aware of the bogus document or information that is false or misleading in a material particular because of information given by the applicant.
- (4) The Minister may waive the requirements of any or all of paragraphs (1)(a) or (b) and subclause (2) if satisfied that:
- (a) compelling circumstances that affect the interests of Australia; or
 - (b) compassionate or compelling circumstances that affect the interests of an Australian citizen, an Australian permanent resident or an eligible New Zealand citizen;
- justify the granting of the visa.
- (5) In this clause:
- information that is *false or misleading in a material particular* means information that is:
- (a) false or misleading at the time it is given; and
 - (b) relevant to any of the criteria the Minister may consider when making a decision on an application, whether or not the decision is made because of that information.

...

Migration Act 1958

s 5 Interpretation

(1) In this Act, unless contrary intention appears:

...

bogus document, in relation to a person, means a document that the Minister reasonably suspects is a document that:

- (a) purports to have been, but was not, issued in respect of the person; or
- (b) is counterfeit or has been altered by a person who does not have authority to do so; or
- (c) was obtained because of a false or misleading statement, whether or not made knowingly.

...